



**IN THE SUPREME COURT OF THE
UNITED STATES**

October Term, 1949

No. 51

PETE DARR,

Petitioner,

VERSUS

C. P. BURFORD, Warden, Oklahoma State Penitentiary,

Respondent.

BRIEF OF RESPONDENT

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

SAM H. LATTIMORE,
*Assistant Attorney General,
Oklahoma City, Oklahoma,
Attorneys for Respondent.*

NOVEMBER, 1949.

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STATEMENT

The statement of the case and argument set forth in the brief of petitioner are largely devoted to the alleged facts upon which petitioner based his plea for a writ of *habeas corpus* and an effort to support the merits of such plea. These issues, however, were not decided by the United States District Court (R. 15) or by the United States Circuit Court of Appeals for the Tenth Circuit (R. 45). We assume, therefore, that a discussion of these issues will not

be material except as same may relate to the action of the United States District Court in denying the writ on the ground that petitioner had not exhausted other remedies available to him. Without conceding that there was any merit in the claims of petitioner, we shall confine our discussion to the pertinent portion of petitioner's brief beginning on Page 17.

ARGUMENT

In view of the fact that the question of jurisdiction to grant writs of *habeas corpus* and the exercise thereof by United States District Courts in relation to persons incarcerated in state prisons pursuant to judgments of conviction in state courts has been recently before this Court and is one with which the members of the Court are entirely familiar, we feel that an extended discussion of same and of the decisions of this Court, which are discussed in the opinions of the United States District Court and the Court of Appeals of the Tenth Circuit is unnecessary. Certainly the action of these two courts is supported by the decisions of this Court in *Ex parte Hawk*, 321 U.S. 114; *White v. Ragen*, 324 U.S. 760, and other cases cited. The one case which caused a division of opinion among the members of the Circuit Court of Appeals is that of *Wade v. Mayo*, 334 U.S. 672, 92 L. ed. 1647. We must admit that we have experienced some difficulty in construing the majority opinion. If we correctly interpret it, however, it does not support petitioner's contention. In order that this question may be more easily determined we incorporate in the Appen-

dix hereto the syllabus and body of the opinion of the State Criminal Court of Appeals as reported in *Ex parte Darr*, 182 Pac. (2d) 523. An examination of this opinion discloses the fact that the Criminal Court of Appeals, after reviewing the facts involved in petitioner's application for a writ of *habeas corpus*, found that his contentions were without merit as a basis for relief by *habeas corpus*, and that he should have raised such questions in the proper manner by taking an appeal from his conviction. The petitioner's effort, therefore, to secure release through application to the federal court for a writ of *habeas corpus* does not find support in the decision of *Wade v. Mayo, supra*, as we understand the same. Certainly, the dissenting opinion is adverse to the contention of petitioner.

CONCLUSION

We respectfully submit that if petitioner had any basis for a contention that he had been denied any of his rights, he had a proper remedy through an appeal to the Criminal Court of Appeals of the state and by *certiorari* to this Court. At his preliminary hearing and subsequent arraignment in district court, petitioner had been represented by counsel of his own choosing, the same counsel who had represented him in a previous trial resulting in his conviction and a twenty-year sentence in the penitentiary for bank robbery (R. 30). On the day the case was first called for trial petitioner requested appointment of an attorney, and the court thereupon appointed Mr. Cox, who represented him through the subsequent proceedings. Having elected not

to take any appeal or follow other remedies for properly bringing the matter to this Court, petitioner's application to the United States District Court was properly denied, and the action of that court affirmed by the United States Circuit Court of Appeals.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma:

SAM H. LATTIMORE,
*Assistant Attorney General,
Oklahoma City, Oklahoma,
Attorneys for Respondent.*

NOVEMBER, 1949.

APPENDIX

Ex parte Darr, No. A-10869. Criminal Court of Appeals of Oklahoma.

"SYLLABUS:

"1. On *habeas corpus*, this court will not look beyond the judgment and sentence of any court of competent jurisdiction as to mere irregularities of procedure or errors of law on questions of which the court has jurisdiction.

"2. The writ of *habeas corpus* cannot be used to perform the office of writ of error on appeal but will be limited to cases in which the judgment and sentence attacked are clearly void.

"3. Where the court has jurisdiction of the person and jurisdiction of the crime charged and the judgment and sentence are not in excess of the statutory limits of the court's power to pronounce, the same is not void.

"The petitioner, with the aid of counsel, filed herein on April 3, 1947, his petition for writ of *habeas corpus*, alleging he is unlawfully confined in the state penitentiary, at McAlester, Oklahoma. He complains of two separate judgments rendered against him in the District Court of Lincoln County, Numbered 2197 and 2199, wherein in each case he was sentenced to serve forty years in the penitentiary for robbery with firearms of banks at Prague and Chandler, Oklahoma.

"(1) The petition for writ of *habeas corpus* alleges first that the petitioner did not have the means to employ counsel and second, that he did not have the aid of counsel, and third, that he did not have the aid of counsel of his own choosing. The record, as revealed by certified copies of the criminal appearance dockets in both cases, does not support the contention of the petitioner. These dockets disclose that after being charged by information and on December 1, 1930, the petitioner was present in person and represented in the

district court by Jimmie Mathis and waived the reading of the information and entered a plea of not guilty. That on December 27, 1930, the cases were set for trial January 13, 1931.

That, on January 13, 1931, it appeared, an application for continuance was filed, stating that defendant was without counsel. Thereupon, the court appointed M. A. Cox, a reputable and able lawyer of Chandler, Oklahoma, to represent the defendant. The record discloses that M. A. Cox ably represented the petitioner throughout the trial, attacking the sufficiency of the information, the sufficiency of the State's evidence, requesting a directed verdict, and after verdict of the jury seasonably filed a motion for new trial and presented same which was overruled and giving notice of intention to appeal and procuring 60-10-5 days time in which to make and serve, sign and settle case-made as a proper predicate for appeal. The record discloses that from this proceeding, no appeal was perfected by the petitioner.

In cause No. 2197, the record is the same until both the State and the defense rested in the trial, whereupon, the defendant, by aid of counsel, asked leave to withdraw his plea of not guilty and enter a plea of guilty, all of which was granted and done.

In both cases, January 16, 1931 was set for sentence day and in both cases the defendant was sentenced to forty (40) years in the penitentiary. The court under the law, § 801, Title 21, O.S.A. might have imposed the death sentence in either case.

It is therefore apparent from the record itself that the defendant was ably represented by counsel and his rights preserved in every stage of the proceedings.

In cause No. 2199, he complains that he filed his motion for continuance because of insufficient time to prepare and procure witnesses. In this, he was represented by counsel M. A. Cox preliminary to the trial. The court found the defendant has not exercised due diligence in this regard.

"(2-4) It is apparent from the record that the petitioner was ably represented by counsel at every stage of the proceedings and that his contentions are without merit as a basis for relief by *habeas corpus*. The court had jurisdiction of the person of the petitioner and jurisdiction of the crime charged. The judgment and sentences not being in excess of the statutory limits of the court's power to pronounce, the same are not void. This court has repeatedly held that on *habeas corpus* it will not look beyond the judgment and sentence of any court of competent jurisdiction as to mere irregularities of procedure or errors of law on questions over which the court has jurisdiction. The writ of *habeas corpus* cannot be used to perform the office of a writ of error on appeal, but will be limited to cases in which the judgment and sentence of the court attacked is clearly void. *In re: Habeas corpus Henry E. Walker*, Okla. Cr. App., 180 Pac. (2d) 670 (not yet reported in State Report); *Ex parte Tollison*, 73 Okla. Cr. 38, 117 Pac. (2d) 549; *Ex parte West*, 62 Okla. Cr. 260, 71 Pac. (2d) 129; *Ex parte Keel*, 62 Okla. Cr. 277, 71 Pac. (2d) 313; *Ex parte Dunn*, 33 Okla. Cr. 190, 242 Pac. 574; *Ex parte Grant*, 32 Okla. Cr. 217, 240 Pac. 759; *Ex parte Hollingshead*, 24 Okla. Cr. 131, 216 Pac. 496.

"(5) The petitioner's record was preserved. If any of his rights were denied in the proceedings or if the evidence was insufficient in his opinion to support the convictions, he should have raised these objections in this court in the proper manner by appeal.

"For the reasons hereinabove stated, the writ of *habeas corpus* is denied."
